

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0749, State of New Hampshire v. Tracy Atwater, the court on December 13, 2007, issued the following order:

The defendant, Tracy Atwater, appeals his conviction on five counts of theft by unauthorized taking or transfer. He argues that the trial court erred in consolidating the charges and in admitting details of his trip to Hawaii. In his *pro se* memorandum of law, the defendant also argues that “the evidence was insufficient to support theft.” We affirm.

We note at the outset that the defendant filed no objection when the State filed a motion to consolidate charges prior to trial. On appeal, he argues, however, that we should find that joinder was error under our plain error rule. See Sup. Ct. R. 16-A. We have limited application of this rule to cases in which: (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. See State v. Henderson, 154 N.H. 95, 96 (2006).

In State v. Ramos, 149 N.H. 118, 128 (2003), we adopted the ABA standards for joinder of criminal offenses, holding that “any two or more offenses committed by the same defendant may be joined for trial, upon the application of the prosecuting attorney or the defense.” We further stated that whenever two or more unrelated offenses were joined for trial, the prosecuting attorney or the defendant had the right to severance of them. *Id.* (“related” offenses are those based upon same conduct, upon a single criminal episode, or upon a common plan); see State v. McIntyre, 151 N.H. 465, 466-67 (2004) (adopting definition of common plan contained in N.H. Rule of Evidence 404(b)).

Based upon the record before us, including the defendant’s failure to object to the State’s motion, we decline to apply Rule 16-A.

The defendant also argues that the trial court erred in allowing introduction of evidence of his trip to Hawaii. We will assume without deciding that this issue has been properly preserved for our review. We review the admissibility of evidence under our sustainable exercise of discretion standard. State v. Lavoie, 152 N.H. 542, 544 (2005) (to establish that trial court’s decision is not sustainable, defendant must demonstrate that ruling was clearly untenable or unreasonable to the prejudice of his case). Even if the issue is properly before us, the record indicates that evidence concerning the trip to

Hawaii had already been admitted at the time the defendant objected to a more developed presentation of this evidence. He has therefore failed to demonstrate prejudice.

Finally, the defendant argues that the evidence was insufficient to support theft. To prevail in a challenge to the sufficiency of the evidence, the defendant bears the burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Crie, 154 N.H. 403, 406 (2006). In reviewing the evidence, we examine each evidentiary item in the context of all the evidence, not in isolation. *Id.* Circumstantial evidence may be sufficient to support a finding of guilty beyond a reasonable doubt. *Id.* The trier may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom. *Id.*

Each of the indictments alleged that the defendant committed the crime of theft by unauthorized taking or transfer by exercising unauthorized control over the funds of the named victim with a purpose to deprive. *See* RSA 637:2, III (2007) (defining “purpose to deprive”). The evidence presented included a continuing pattern of misrepresentations by the defendant to the victims after entering into contracts for the performance of work. When the defendant failed to either perform or complete performance of the work, he represented that he would do so. When asked to refund deposits for incomplete or unperformed work, he represented that he would do so and subsequently advised that he had hired an attorney to disburse refunds. While in some cases the defendant provided partial, nominal refunds, he did not provide an attorney with the funds or authorizations to complete repayments. He also failed to respond to telephone calls or to accept certified letters from customers seeking refunds. Given the evidence in the record, construed in the light most favorable to the State, the defendant cannot establish that no rational trier of fact could find guilt beyond a reasonable doubt.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**